

BORA LASKIN LAW LIBRARY



3 1761 10075094 2



UNIVERSITY OF TORONTO FACULTY of LAW

Ethics in the Business Law Setting Coursebook

2015-2016

Kathryn Daniels

Volume 2

K
1315
.D36
2015
v.2
c.1

A faint, out-of-focus background image of a classical building with four columns and a triangular pediment, centered on the page.

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

<https://archive.org/details/ethicsinbusiness02dani>



UNIVERSITY OF TORONTO FACULTY of LAW

Ethics in the Business Law Setting Coursebook

2015-2016

Kathryn Daniels

Volume 2

ETHICS IN THE BUSINESS LAW SETTING **FALL TERM 2015**

Kathryn “Katie” Daniels
Ontario Securities Commission
Telephone: 416-593-8053
Email: kdaniels@osc.gov.on.ca
Office Hours: By appointment

Course Description

This course explores ethical issues in business law and situates them within the broader intellectual framework of the corporation in a free market society. The course will focus on various topics relating to the corporation and lawyers’ obligations in acting for corporations. Specific topics to be examined include: corporate social responsibility, corporate disclosure, lawyers’ professional and ethical responsibilities and conflicts of interest. Students will explore theoretical foundations of legal ethics and apply these concepts to practical circumstances, including complex securities transactions and litigation emanating from these transactions, in order to develop an ability to analyze ethical issues that arise in a business law setting and identify the risk of ethical lapses. We will invite leading practitioners into the class for discussion of these issues in a concrete setting.

Pre-requisite or Co-requisite: Business Organizations

Professor

Ms. Daniels became the Deputy Director in the Corporate Finance Branch of the Ontario Securities Commission in February 2013 following several years as Deputy Director of the Commission’s Enforcement Branch. Katie has been a member of staff of the Commission since 2000 and has managed and acted as counsel for many complex proceedings commenced by OSC Staff. Following her graduation from the University of Toronto law school in 1992, she practiced commercial litigation with a large Toronto firm. Katie earned her Global Professional Masters of Law (GPLLM) from the University of Toronto law school in 2012.

Materials

There are two required items for purchase and also on reserve in the library.

1. Peter Kissick, ed. *Business Ethics: Concepts, Cases and Canadian Perspectives*, (Emond Montgomery Publications, 2012) [BEC]. We will not be reading this book in its entirety but will be reading certain chapters.
2. Casebook available electronically on blackboard and in print at the bookstore.

Evaluation

Students will write a 24 hour take-home examination worth 80% of the mark. The other 20% of the student's mark will be based on: attendance, class participation/contributions to class discussion in the form of questions and comments relevant to the course material, and postings regarding the course material to the online discussion board.

Class Format

The format of this class will be a combination of lecture and discussion. Preparation for Class In order to get the most out of the class discussion, you will need to prepare before coming to class. This will mean that you will need to complete the assigned readings.

Questions and Meetings

Over the course of the term, you may wish to ask me questions or to speak with me about the course material as I am off-campus.

READING LIST

Introduction

Class 1 on September 10th: The Boundaries of Law and Morality in Context

The goal of the introductory session is to familiarize students with the subjects of legal ethics and the corporation. In order to do this, we will examine key concepts. For example, is ‘ethics’ the same thing as professionalism and etiquette? Is ethics in business law an oxymoron?

- What is this course about?
- Introduction to the Legal Profession and Ethical Issues in the Profession
- Sources of Law: Rules of Professional Conduct, Statute, Case Law

Chapter 1, 2 and 7 in BEC

Law Society Rules of Professional Conduct (excerpt to be posted on Blackboard)

Class 2 on September 17th: Theoretical Analysis of the Corporation

This session engages in an analysis of the corporation: if we are to understand the lawyer’s ethical obligations with regards to business, then the first place to begin is surely with an analysis of the corporation. We will also examine the question of whether firms capable of being held morally responsible or are only their agents (among whom lawyers are one) so capable? Following this question, the key issue to be debated follows: Is business merely obligated to maximize profit for its shareholders while obeying the law, or are there additional ethical obligations as well?

- Theory of the Firm
- Agency Relationships
- Economics of the Profession

Chapter 4 “An Introduction to Stakeholder Analysis” in BEC

Chapter 5 “Critiques of Stakeholder Theory” in BEC

Chapter 6 “Corporate Social Responsibility: The Canadian Experience” in BEC

*Milton Friedman “The Social Responsibility of Business is to Increase Its Profits”
(Sept. 13, 1970) New York Times*

Lawyers' Various Roles

Lawyers occupy many different positions in our society: they work within and outside corporations. They work in government and in non-profit corporations. In this section, we examine the ethical and legal responsibilities of inside and outside counsel and their respective relationships with “the corporation”. We note the difficult position in which these lawyers can find themselves given that they are retained or employed by a corporation that is a legal fiction.

Class 3 on September 24th: Inside and Outside Counsel #1

Corporation as Legal Fiction

Conflicts of Interest

Policy Choices: Up-the-ladder reporting, Whistleblowing

Todd Archibald, Ken Jull, & Kent Roach, “Corporate Criminal Liability: Myriad Complexity in the Scope of Senior Officer” (2014) 60:1 Criminal Law Quarterly.

Hollinger (Mark Kipnis case) –

District Court: United States v Black, 469 F Supp 2d 513, NDill (2006).

Court of Appeal: United States v Black, 625 F3d 386, 392 (7th Cir 2010).

Supreme Court: Black v United States, 130 S Ct 2971 (2010).

Class 4 on October 1st: Inside and Outside Counsel #2

Guest Speaker: Ian Smith

Corporation as Legal Fiction

Noisy Withdrawal and Whistleblowing

Law Society of Upper Canada v DeMerchant, 2013 ONLSP 0153 & Law Society of Upper Canada v Darren Elliot Sukonick, 2013 ONLSP 0152 (combined cases) and 2014 ONLSTH 91 & Law Society of Upper Canada v Sukonick, 2014 ONLSTH 90 (combined cases).

Drew Hasselback, “Law Society absolves lawyers DeMerchant and Sukonick after seven-year legal battle over Hollinger work”, Legal Post (17 October 2013), online:

Legal Post <http://business.financialpost.com/2013/10/17/law-society-absolves-hollinger-lawyers-after-seven-year-legal-battle>.

Whistleblowing: BEC pp. 200-201

Noisy Withdrawal: *Solicitor-Client Privilege - Sarbanes-Oxley Act (Canadian Bar Association, June 2014), online: www.cba.org/cba/epiogram/pdf/sarbanes.pdf.*

Ontario Securities Commission Staff Consultation Paper 15-401 “Proposed Framework for an OSC Whistleblower Program”

Class 5 on October 8th: Self-regulation and Large Law Firms

One important stakeholder in the discussion about legal ethics in the business law setting is the large law firm. In this class, we examine the role that corporate law firms play in representing their clients and as leaders in establishing norms regarding professional regulation.

- Self-regulation
- Regulatory Capture
- External vs. Internal Self-regulation

Adam Dodek, "Regulating Law Firms in Canada" (2012) 90 Canadian Bar Rev 2.

Anita Anand "Large Law Firms and Capture: Towards a Nuanced Understanding of Self-Regulation" (2013) 92 Canadian Bar Review Rev 207.

Class 6 on October 15th: Conflicts of Interest

Guest Speaker: Eugene Cipparone, Professional Support Director and Knowledge Management, Goodmans LLP

One of the most litigious areas in the area of ethics and professionalism relates to conflicts of interest. In this class, we examine rules and cases relating to conflicts of interest with a focus on corporate transactions.

- Definitions and Types of Conflicts
- Case Law
- Retainers, Rejections and Firewalls

Strother v 3464920 Canada Inc, [2007] 2 SCR 177.

Chapters Inc v Davies, Ward & Beck LLP, 2000 52 O.R. (3d) 566 (CA).

CN Railway Co. v McKercher LLP [2013] 2 SCR 649, 2013, SCC 39.

Adam M Dodek, "Conflicted Identities: The Battle over the Duty of Loyalty in Canada" (2011) 14:2 Legal Ethics 193, online: <http://dx.doi.org/10.5235/146072811798828521>.

Specific Subject Areas in Corporate Practice

In this section of the course, we move to examine specific subject areas in which law and business intersect. The following sessions involve more of a practical application of the frameworks initially discussed to a variety of topics, focusing on lawyers' roles and his or her legal and ethical responsibilities in the business law setting.

Class 7 on October 22nd: Civility

Regardless of the roles that a lawyer plays, and whether the lawyer is an inside or outside counsel, working in government or any other aspect of the legal profession, once he or she is called to the Bar, the lawyer has an obligation to act with integrity. This obligation has, in turn, led to an obligation for lawyers to act with civility. In this class, we examine the origins of the civility movement and examine its merits. We will return to this topic at the end of the course in considering the role of the Law Society.

- What is “civility”?
- Lawyer’s Responsibilities in Representing Clients
- Role of the Law Society

Alice Woolley, Does Civility Matter? 46:1 (2008) Osgoode Hall Law Journal, online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1211&context=ohlj>.

Law Society of Upper Canada v Groia, (2012) ONLSHP 94, [2012] LSDD No 92.

Class 8 on October 29th: Public Offerings and Disclosure

In this class, we examine the lawyer’s role in taking a corporation public or completing a secondary market offering. We will focus specifically on the lawyer’s role in ensuring that the public corporation meets its disclosure obligations. We will ask whether the lawyer has an ethical obligation to exceed legal requirements relating to disclosure.

- Offerings
- Making Disclosure and Regulatory Proceedings
- Legal v Ethical obligations: Case Study –Wilder

Chapter 14 BEC

YBM Magnex International Inc (2003), 26 OSCB 5285, online: Ontario Securities Commission https://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20030627_ybm-magnex2.pdf.

Wilder v Ontario Securities Commission, (2000), 47 OR(3d) 361, 184 DLR (4th) 165, 131 OAC 369 (Ont Ct. Gen Div), aff’d (2001), 53 OR (3d) 519, 197 DLR (4th) 193, 142 OAC 300 (Ont CA), online:

CanLii <http://www.canlii.org/en/on/onca/doc/2001/2001canlii24072/2001canlii24072.html>

Class 9 on November 12th: Complex Corporate Transactions

Guest Speaker: Naizam Kanji, Director, Office of Mergers & Acquisitions, Ontario Securities Commission

We here contemplate complex corporation transactions – takeover-bids, arrangements and other mergers – and contemplate the lawyer’s role during and after these transactions. Does a lawyer have a role to ensure that shareholders are “protected”? What does acting ethically in the context of a corporate transaction mean? Does it relate to the size of the premium payable to shareholders?

- Types of transactions
- Magna case study
- Lawyers’ legal and ethical duties

Magna International Inc (Re), (2010) 34 OSC Bull 1290 (OSC), online: Ontario Securities Commission https://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20100624_magna.pdf.

Anita Anand, “Was Magna in the Public Interest?” 49:2 (Fall 2011) Osgoode Hall Law Journal 311, online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1058&context=ohlj>.

Class 10 on November 19th: Insider Trading

Here we examine the practice of insider trading and cases in which lawyers are alleged to have breached insider trading rules. The session concludes with a debate over when it is permissible or even obligatory to blow the whistle on one’s colleagues or employer due to legal or ethical misconduct.

- What is insider trading?
- Rules relating to insider trading
- Lawyers’ legal and ethical obligations

In the Matter of Paul Azeff, Korin Bobrow, Mitchell Finkelstein, Howard Jeffrey Miller and Man Kin Cheng (24 March 2015) (Reasons and Decisions) (OSC), online: https://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20150324_azeffp-2.pdf.

Towards Resolution

In this last section of the course, we examine the prosecution of lawyers because of their violation of legal and/or professional obligations. We also examine arguments that lawyers can make in the face of prosecution including the question of costs.

Class 11 on November 26th: Role of the Law Society and Courts

- Law Society's Powers
- Self-regulation and policing "your own"
- Case Study: Groia

Law Society of Upper Canada v Groia, (2012) ONLSHP 94, [2012] LSDD No 92 (listed above for class 7)

Law Society of Upper Canada v Joseph Peter Paul Groia, 2013 ONLSAP 41 (CanLII).

Groia v. Law Society of Upper Canada [2014] O.J. No. 4844, 2014 ONSC 6026 (CanLII).

Groia v. Law Society of Upper Canada [2015] O.J. No. 1267, 2015 ONSC 1680 (CanLII).

Groia v. Law Society of Upper Canada [2015] O.J. No. 444, 2015 ONSC 686 (CanLII).

Joseph Groia, Nick Wall & Elizabeth Carter, "Shades of Mediocrity: The Perils of Civility" (Paper delivered at the Canadian Bar Association Legal Conference in the session, "Civility in the Legal Profession: Zealous Advocacy v. Professional Duty," August 17, 2014) Canadian Bar Review.

Class 12 on December 3rd: Defences, Excuses and Justifications

Dan M Kahan, "Ignorance of law is an Excuse: But only for the Virtuous" (1997) 96 Mich L Rev 1, online: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1112&context=fss_papers.

Peter Small, "Lawyer who posted Crown disclosure online admits 'terrible mistake'" Law Times News (July 7 2014), online: Law Times Online <http://www.lawtimesnews.com/201407074068/headline-news/lawyer-who-posted-crown-disclosure-online-admits-terrible-mistake>.

Wrap up and discussion of course material and final exam

Ethics In The Business Law Setting
Fall Term 2015
Professor Kathryn “Katie” Daniels

TABLE OF CONTENTS

	Page
Theoretical Analysis of the Corporation	
Milton Friedman, “The Social Responsibility of Business is to Increase its Profits”	1
Inside and Outside Counsel #1	
Todd Archibald, Ken Jull & Kent Roach, “Corporate Criminal Liability: Myriad Complexity in The Scope of Senior Officer”	7
Hollinger (Mark Kipnis case)	
District Court: <i>United States v Black</i>	37
Court of Appeal: <i>United States v Black</i>	60
Supreme Court: <i>Black v United States</i>	66
Inside and Outside Counsel #2	
<i>Law Society of Upper Canada v DeMerchant</i>	73
Drew Hasselback, “Law Society absolves lawyers DeMerchant and Sukonick after seven-year legal battle over Hollinger work”	125
Noisy Withdrawal: Solicitor-Client Privilege	127
Ontario Securities Commission Staff Consultation Paper 15-401 “Proposed Framework for an OSC Whistleblower Paper”	129
Self-Regulation and Law Firms	
Adam Dodek, “Regulating Law Firms in Canada”	160
Anita Anand, “Large Law Firms and Capture: Towards a Nuanced Understanding of Self-Regulation”	219
Conflicts of Interest	
<i>Strother v 3464920</i>	240
<i>Chapters Inc v Davies, Ward & Beck LLP</i>	329
<i>Canadian National Railway Co. v. McKercher LLP</i>	345
Adam M. Dodek, “Conflicted Identities: The Battle over the Duty of Loyalty in Canada”	374

Ethics In The Business Law Setting
Fall Term 2015
Professor Kathryn “Katie” Daniels

TABLE OF CONTENTS

	Page
Civility	
Alice Woolley, “Does Civility Matter?”	396
<i>Law Society of Upper Canada v Groia</i>	410
Public Offerings and Disclosure	
<i>YBM Magnex International Inc.</i>	463
<i>Wilder v Ontario Securities Commission</i>	588
Complex Corporate Transactions	
<i>Magna International Inc.</i>	612
Anita Anand, “Was Magna in the Public Interest?”	627
Insider Trading	
<i>In the Matter of Paul Azeff, Korin Bobrow, Mitchell Finkelstein, Howard Jeffrey Miller and Man Kin Cheng, Reasons for Decision on a Stay Motion</i>	648
Role of the Law Society and Courts	
<i>Groia v. Law Society of Upper Canada [2013] L.S.D.D. No. 186, 2013 ONLSAP 41</i>	705
<i>Groia v. Law Society of Upper Canada [2014] O.J. No. 4844, 2014 ONSC 6026</i>	794
<i>Groia v. Law Society of Upper Canada [2015] O.J. No. 1267, 2015 ONSC 1680</i>	801
<i>Groia v. Law Society of Upper Canada [2015] O.J. No. 444, 2015 ONSC 686</i>	804
Joseph Groia, Nick Wall & Elizabeth Carter, “Shades of Mediocrity: The Perils of Civility”.....	847
Defences, Excuses and Justifications	
Dan M. Kahan, “Ignorance of Law Is an Excuse - But Only For the Virtuous”	875
Peter Small, “Lawyer who posted Crown disclosure online admits ‘terrible mistake’”	904